

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

SYLVIA A. WHALEY,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, and STATE  
FARM ENTITY, (True and Exact Name  
Unknown) a part of State Farm Insurance  
Companies;

Defendants.

**8:24CV57**

**MEMORANDUM AND ORDER**

Plaintiff Sylvia A. Whaley, a non-prisoner, filed her pro se Complaint, [Filing No. 1](#), on February 13, 2024, along with a Motion for Leave to Proceed in Forma Pauperis, [Filing No. 2](#). Upon review of Plaintiff's Motion, the Court finds that Plaintiff is financially eligible to proceed in forma pauperis. Defendants filed a motion to dismiss on March 18, 2024, [Filing No. 5](#), prior to the Court ruling on Plaintiff's IFP Motion and completing its initial review of the Complaint to determine whether summary dismissal is appropriate under [28 U.S.C. § 1915\(e\)\(2\)](#).

Because the Motion to Dismiss only challenges whether the Court has subject matter jurisdiction and whether the Complaint states a claim upon which relief can be granted, Defendants effectively have waived service of process. See [Fed. R. Civ. P. 12\(h\)\(1\)\(A\)](#) ("A party waives any defense listed in Rule 12(b)(2)-(5) by . . . omitting it from a motion in the circumstances described in Rule 12(g)(2) . . .").<sup>1</sup> Consistent with

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<sup>1</sup> [Rule 12\(g\)\(2\)](#) states: "[A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Defendants have only moved to dismiss Plaintiff's Complaint under [Rule 12\(b\)\(1\)](#) and [Rule 12\(b\)\(6\)](#). Consequently, [Rule 12\(b\)\(4\)](#) and [Rule 12\(b\)\(5\)](#) defenses of insufficient process and insufficient service of

paragraph 6 of General Order No. 2022-04, [Filing No. 4](#), the Court finds that this case should be removed from the pro se docket because Defendants effectively have waived service of process and Plaintiff is not a prisoner.

IT IS THEREFORE ORDERED:

1. Leave to proceed in forma pauperis is granted, and the Complaint shall be filed without payment of fees.
2. This case is removed from the pro se docket. The Clerk of the Court shall randomly assign new judges to this case and request a reassignment order from the Chief Judge.

Dated this 17th day of April, 2024.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J F Bataillon", with a stylized flourish at the end.

Joseph F. Bataillon  
Senior United States District Judge

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process are waived. See Wright & Miller, 5B [Fed. Prac. & Proc. Civ. § 1353](#) (3d ed.) (“[I]f a motion is made asserting any of the defenses listed in [Rule 12\(b\)](#), any objection to process must be joined in that motion or it will be deemed waived. Thus, a subsequent motion under [Rule 12\(b\)\(4\)](#) or [Rule 12\(b\)\(5\)](#) raising the defense or its inclusion in the answer will be barred and the court will proceed with the case.”).